11-10-2009

Kuhn v. Coldwell Banker Landmark, Inc. Appellant's Brief Dckt. 29794

IN THE SUPREME COURT OF THE

STATE OF IDAHO

DARREN G. KUHN, an individual, SCHEI DEVELOPMENT CORPORATION, an Idaho corporation, ROGER J. SCHEI, an individual, and FRANCES R. SCHEI, an individual

Plaintiffs-Respondents,

vs.

COLDWELL BANKER LANDMARK, INC. n/k/a LANDMARK REAL ESTATE, INC., an Idaho corporation, KELLY FISHER, an individual, TODD BOHN, an individual and JOHN MERZLOCK, an individual,

Defendants-Appellants,

and

PROFESSIONAL ESCROW SERVICES, INC., an Idaho corporation, and RONALD BITTON, an individual,

Defendants-Non Appellants

SUPREME COURT
DOCKET NO. 29794

Bannock County Case No. CVOC-00-0226A

APPELLANTS' OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

The Honorable Peter D. McDermott, presiding.

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STATEMENT OF THE CASE

This case involves a real estate transaction between Darren and Jacqueline Kuhn ("Kuhns") and Roger and Francis Schei ("Scheis") and their relationship and dealings with the real estate agents employed by the Kuhns and the Scheis. The Scheis and Darren Kuhn ("Kuhn") are the Plaintiffs in the underlying matter. The Defendants in the underlying matter were either agents or brokers employed by Landmark Coldwell Banker or the brokerage itself except for Ronald Bitton and Professional Escrow Services, who are not appealing in this matter. The Kuhns owned a house on Mountain Park Road in Chubbuck, Idaho ("Mountain Park Property"). Pl's. Compl. R. Vol. I, p. 30. They desired to purchase a house Schei constructed on Manning Lane ("Manning Lane Property"). *Id.* In order to facilitate the purchase of the Manning Lane Property by the Kuhns, the Scheis entered into a lease agreement for the Kuhns' Mountain Park house. *Id.* at 34. The Scheis agreed to lease the Mountain Park Property until it could be sold as the Scheis could not obtain financing to purchase the property outright. *Id.* Eventually, the Scheis stopped paying the rent and walked away from the Mountain Park Property in violation of the lease agreement and the purchase and sale agreement on the Manning Lane house. *See id.* at 39.

The Scheis and Kuhns filed the underlying lawsuit after the mortgage holder foreclosed on the Kuhns' Mountain Park house. *See generally id.* at 27-44. The mortgage was in default because the Scheis discontinued the lease payments they were making on the Mountain Park home. Defendants were all real estate agents hired by Plaintiffs to sell the properties in question and were employed under Coldwell Banker Landmark (hereinafter "Defendants"). *See* Def.'s Answer R. Vol. I, p. 54. They received only the commission paid for the purchase by the Kuhns of the Manning Lane Property. As the Mountain Park Property never was sold, no commission was ever paid on that transaction. Pl's. Compl. R. Vol. I, p. 39

This case arose out of a claim by the Respondents that Appellants committed negligence, breach of fiduciary duty, and fraud, causing financial damages to Respondents. *See generally id.* at

27-44. Specifically, the Scheis and Darren Kuhn[1] claimed that the Defendants altered documents after they were signed by the Respondents, improperly obtained an appraisal for the property on Manning Lane, demanded a commission on Mountain Park where one was not earned, signed a lease without authority, and insisted on a listing where one was not required. Respondents claimed that these acts caused them financial losses. *Id.*

Respondents put on evidence in support of these allegations and Appellants put on evidence to rebut those claims. As to liability, Appellants' evidence focused on Respondents' inability to prove that the documents were altered by the Defendants, that a commission was paid as to Mountain Park, or that the Defendants lacked authority to sign the lease. *See* discussion *infra* Part IV.B.1. As to damages, the Defendants' evidence focused on the Respondents' inability to prove that the Defendants' conduct caused any damages to Kuhn or the Scheis. Additionally, the evidence showed other reasonable likely causes for Respondents' damages. *See id.*

The matter was tried in a lengthy trial before a jury. The jury came back with a verdict finding liability and awarding Darren Kuhn $748,746.68 in total damages including $558,088.00 in punitive damages. R. Vol. II, page 307-314. The jury awarded the Scheis $453,163.18 in total damages including $364,035.00 in punitive damages. *Id.*

Following the verdict, among other post-verdict motions filed by all parties, the Defendants filed motions for a judgment notwithstanding the verdict, a motion for a new trial, and a motion for remittitur along with motions for relief pursuant to Idaho Rule of Civil Procedure 60(b). R. Vol. III, page 529-531 and 557-558. Pursuant to the Appellants' motion and the fact that the jury found Appellant's only ninety percent and eighty-seven percent responsible, the award to each for their negligence claims were reduced. R. Vol. IV, page 866(e)-(g). Also following the jury verdict, Kuhn and the Scheis moved the court for attorney's fees and costs, which motion was granted. R. Vol. IV,

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[1]Darren Kuhn's ex-wife Jacqueline Kuhn was not a Plaintiff or even a witness in the trial of this matter.

page 866(k)-(s). Appellants have now timely appealed as set out in the Notice of Appeal and in the Issues Presented on Appeal below. R. Vol. IV, page 871-875.

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in allowing Respondents to use what amounted to a liability expert?
2. Did the District Court err in allowing Respondents' amendment for punitive damages and were the punitive damages awarded by the jury excessive?
3. Did the District Court err in denying any of Appellants' Post Verdict Motions?
4. Did the District Court err in its rulings on various evidentiary issues?
5. Did the District Court err in allowing certain jury instructions while refusing others?
6. Did the District Court err in the amount of attorney's fees it awarded?

ARGUMENT

I. Standard of Review

As the appeal in this matter covers a broad range of issues, a different standard of review will apply to each individual matter appealed by the Defendants. The matters will be taken in the same order presented below in the body of this brief and in the same order as appealed in Appellants' Notice of Appeal. *See* R. Vol. IV, page 871-874. The first matter in Appellants' Notice of Appeal is in regards to testimony allowed by Judge McDermott from an expert witness regarding the liability of the Defendants. The standard of review with regard to admission of evidence is clear from case law. "Trial courts have broad discretion in the admission of evidence at trial, and their decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion. The same standard applies to the admission of expert testimony." *Karlson v. Harris*, 140 Idaho 561, 564 (2004).

Defendants' appeal with regard to the award of punitive damages is twofold. First, the Defendants argue that the Scheis and Kuhn should not have been allowed to proceed with their claim of punitive damages at all. R. Vol. IV, page 872. The appropriate standard of review for an appeal

of a district court's allowing an amendment to the complaint to allow for punitive damages is abuse of discretion. *See Hall v. Farmers Alliance Mutual Ins. Co.*, 145 Idaho 313, 319 (2008). The Idaho Supreme Court has found that in reviewing such a decision for abuse of discretion, it should abide by the following:

> When reviewing a trial court decision for abuse of discretion, the sequence of the inquiry is (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Id.

Whether or not the award of punitive damages is excessive or is a violation of due process is met with a different standard. For constitutionality questions, the *Hall* court opined that "the standard of review applicable to questions of law is one of deference to factual findings, but [the court] freely examine[s] whether statutory and constitutional requirements have been met in light of the facts as found." *Id.* at 320.

Next, the Defendants have appealed the district court's rulings with regard to their post-verdict motions. R. Vol. IV, page 872. The Defendants made a number of post verdict motions, which require a different standard of review from this court. One of those motions was a 60(b) motion. In determining the appropriate standard of review for a denial of a motion for relief under Idaho Rule of Civil Procedure 60(b), a court must consider what subsection of the rule the appellants are invoking. The Idaho Court of Appeals addressed this issue and reasoned as follows:

> Rule 60(b) enunciates a variety of grounds upon which relief from a judgment may be obtained. Some grounds– such as mistake, inadvertence, surprise or excusable neglect under subsection (b)(1) allow discretionary relief. Others, such as the voidness of a judgment under subsection (b)(4), create a nondiscretionary entitlement to relief . . . Where discretionary grounds are invoked the standard of review is abuse of discretion. Where nondiscretionary grounds are asserted,

> the question presented is one of law upon which the appellate court exercises free review.

Knight Insurance, Inc. v. Knight, 109 Idaho 56, 59, 704 P.2d 960, 963 (Ct. App. 1985).

Appellants appealed under rule 60(b)(3), which is likely an abuse of discretions standard.

The next post-verdict motion from which the Defendants appeal is a Motion to Alter or Amend a Judgment. The Idaho Court of Appeals has found that this is an appealable issue, but "only on the question of whether there has been a manifest abuse of discretion. *Lowe v. Lym*, 103 Idaho 259, 263 (Ct. App. 1982).

The Defendants next appeal the denial of their motion for judgment notwithstanding the verdict. With regard to judgments notwithstanding the verdict, courts review the motions *de novo* "The standard of review of a grant or denial of a motion for judgment notwithstanding the verdict is the same as that of the trial court when ruling on the motion." *Bates* v. *Seldin*, 146 Idaho 772, 774 (2009) (citing *Horner v. SaniTop, Inc.*, 143 Idaho 230, 233 (2006)). That standard will be set out more completely in the body of this brief, but such a motion will be denied "if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury." *Id.*

The Defendants' motion for new trial was also denied below and Appellants appeal from that decision as well. The standard of review for seeking a reversal on appeal of a denial of a motion for new trial is well settled. Due to the trial court having actually heard the evidence presented, its "grant or denial of such motions must be upheld unless the court has manifestly abused the wide discretion vested in it." *Warren v. Sharp*, 139 Idaho 599, 602 (2003).

The next issue for appeal is with regard to evidentiary issues in general. The standard for such a motion has already been set out above with regard to Defendants' appeal of the trial court's rulings regarding admission of testimony of expert witnesses. No further information should be required with regard to the standard of review for similar evidentiary issues.

Next, the Defendants' appeal the appropriateness of selected jury instructions. The Appellate

Courts exercise free review in determining the correctness of a trial court's jury instructions. *Vanderford Co, Inc. v. Knudson,* 144 Idaho 547, 552 (2007). "The standard of review of whether a jury instruction should or should not have been given, is whether there is evidence at trial to support the instruction." *Id.* (citing *Craig Johnson Constr., LLC v. Floyd Town Architects, P.A.*, 142 Idaho 797, 800 (2006)).

Finally Appellants have appealed the award of Attorney's fees and the amount of the award. To the extent the award of attorney's fees "depends on the interpretation of a statute, the standard of review for statutory interpretation applies." *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 176 (2009). In that case, it is a question of law over which this Court exercises free review. *Id.* However, otherwise, "the awarding of attorney fees and costs is within the discretion of the trial court and subject to review for an abuse of discretion." *Smith v. Mitton*, 140 Idaho 893, 897 (2004). Further, a district court's "determination of a reasonable amount of attorney fees is a factual determination to which this court applies an abuse of discretion standard." *Id.* at 902.

II. The District Court abused its discretion in allowing Respondents' Expert Witness to Testify as to whether or not Appellants' Conduct was Outrageous.

It has been held in Idaho that an expert witness may not testify regarding the standard of care of a real estate agent. In *Rockefeller v. Grabow* , 136 Idaho 637 (2001), the court heard a case revolving around the fiduciary duty a real estate agent owes to his or her client. The district court refused to allow testimony from an expert witness regarding the standard of care of a real estate agent. The Idaho Supreme Court affirmed, opining that:

> The threshold test for the admission of expert testimony is whether the scientific, or other specialized knowledge of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue. *See* I.R.E. 702. The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror. Where the normal experience

> and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances, then expert conclusions or opinions are inadmissible. . . . The standard of care of an agent is clearly established by prior case law of this Court. As an agent, [Defendant] owed the [Plaintiffs] a duty of loyalty, good faith and fair dealing. Although the facts of this case are different from previous cases, the jury could readily apply the facts to the legal standard without the assistance of expert testimony.

Rockefeller v. Grabow, 136 Idaho 637, 647 (2001) (citations omitted).

Again, as is the case here, though the facts of the case differ, the jury could readily apply the facts to the legal standard without the assistance of expert testimony.

In this matter, while the expert, Ms. Manning was not allowed to testify as to the standard of care, she was allowed to testify as to whether or not the conduct of the Defendants was outrageous. Tr. Vol. III, p. 2561, l. 6 - p. 2562, l.5; *See also* Tr. Vol. III, p. 2620, l. 9-24. Outrageous conduct is defined in Black's Law Dictionary as "conduct so extreme that it exceeds all reasonable bounds of human decency." *Black's Law Dictionary*, "Outrageous Conduct" (8th ed. 2004). In ruling that an expert was necessary to assist the jury in its determination as to whether the Appellants' conduct was outrageous, the court ruled in effect that the jury was not competent to rule on the reasonable bounds of human decency. On that, no jury needs assistance from an expert witness. And surely an expert witness with regard to real estate transactions is not qualified to testify as to what the reasonable bounds of human decency are.

Additionally, allowing the expert to testify as to whether or not she felt the conduct of the Defendants was outrageous allowed the expert to testify indirectly to what the court already ruled she could not testify to directly. Indeed, if the conduct was so egregious that it left the bounds of human decency, it must also not be in good faith as required by the law for real estate agents. Actions outside the bounds of honesty, good faith and fair dealing are like a subset of actions outside the bounds of human decency. It is akin to disallowing expert testimony in a car accident case on whether or not the expert believes that the defendant was negligent, but allowing that same expert

to testify as to whether or not the defendant was grossly negligent.

If the jury in *Rockefeller* was allowed to decide whether or not the real estate agent breached his fiduciary duty to his clients, it follows that the jury in the case at hand should also be allowed to have so much trust placed in it. In allowing the expert witness to testify as to whether or not she believed the Defendants' conduct to be outrageous or not, the district court abused its discretion. Not only is that a decision that should be made by a jury without the input of an expert, but it in effect allowed the expert to testify that she thought the Defendants breached their fiduciary duty as well.

III. The District Court Erred in its Rulings Regarding Punitive Damages both as to their being Allowed to be Argued to the Jury and as to Allowing them to Stand Despite their Excessiveness.

It is the contention of the Appellants that the District Court erred in its allowing Kuhn and the Scheis to move forward with their punitive damages claims and that the amount awarded by the jury was unconscionable.

A. The Respondents should not have been allowed to proceed with their claim for punitive damages at trial.

Idaho Code § 6-1604 governs claims for punitive damages, and provides, in pertinent part:

> (1) In any action seeking recovery of punitive damages, the claimant must prove, by a preponderance of the evidence, oppressive, fraudulent, wanton, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.
>
> (2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for

> relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.[2]

One of the leading cases in Idaho on punitive damages is *Cheney v. Pales Verde Inv. Corp.*, 104 Idaho 897 (1983). In *Cheney*, the Idaho Supreme Court stated the following:

> Mindful of the purpose of punitive damage awards, we note that they are not favored in the law and therefore, **should be awarded only in the most unusual and compelling circumstances.** *Hatfield v. Max Rouse & Sons Northwest, supra; Jolly v. Paraguay, supra. See also Yacht Club Sales & Service, Inc., supra; Jolly, supra; Linscott, supra; Cox, supra,* as holding that the **policy behind punitive damages is deterrence rather than punishment.** An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was '**an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.**' *Hatfield v. Max Rouse & Sons Northwest, supra,* 100 Idaho at 851, 606 P.2d at 955. *See Linscott, supra.* The **justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether the state be termed 'malice, oppression, fraud or gross negligence'** ... (citations omitted.) (Emphasis added.)

104 Idaho at 904-905. Therefore, to establish a claim for punitive damages, the Respondents had to show that the Defendants' actions were "an extreme deviation from reasonable standards of conduct" and that they acted "with an extremely harmful state of mind, whether the state be termed malice, oppression, fraud or gross negligence." *Id.*

The evidence set forth in the trial of this matter did not establish such deviant behavior as to

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[2]Since the verdict in this case came down, there have been some changes to the law regarding punitive damages. It must now be proven by clear and convincing evidence, and there is now a limit on punitive damages that can be awarded. The statute as cited here is in the form it was in at the time of the trial.

allow a claim for punitive damages to proceed. As discussed below regarding the denial of Appellants' motion for a judgment notwithstanding the verdict, there is not sufficient evidence for the jury to find the way it did. There was no real evidence of fraud and certainly nothing that could rise to the level of clear and convincing evidence. All alleged fraudulent statements were orally made and, as set forth below, required a writing pursuant to the Statute of Frauds. *See* discussion *Infra*, part IV.C.3.

B. The Court should have found the punitive damages awarded by the jury in this matter excessive and unconstitutional.

Defendants contend that the excessiveness of the punitive damage award requires a remand. To determine whether a punitive damage award is excessive, the Court must ascertain whether the punitive damage award appears to have been given under the influence of passion or prejudice. *Griff, Inc. v. Curry Bean Co., Inc.*, 138 Idaho 315, 322 (2003). "Proportionality" is a factor to be considered in evaluating whether a punitive award is excessive. *Id.* In *Griff*, the Supreme Court held that a punitive damage award of $93,497.00 was not disproportionate to the compensatory award of $445,124.00. It further held that although the punitive damage award constituted a significant amount (48.65%) of the defendant's 1999 assets, it would not be set aside because the defendant had transferred assets to third parties to reduce its net worth. *Id.*

In this case, the punitive damage awards not only are disproportionate to the compensatory awards, they are also disproportionate to the parties' net income. The punitive damage award for Kuhn ($558,088) is 310% of the compensatory award against these defendants for Kuhn ($179,219). The punitive damage award for Scheis ($364,035) is 430% of the compensatory award against these defendants for Scheis ($84,483). Todd Bohn's net income for 1998 was $12,180 from the sales of homes. Pl. Ex. 65. For 1999, he had net income of $13,883 from the sales of homes. For 2000, he had net income of $18,382 from the sale of homes. That is a total of $44,445 for the years involved. R. Pl. Ex. 65. The punitive damages award against him for the Scheis and Kuhn was $63,750. He has to been ordered to pay more in punitive damages than he made in net income. The punitive

damages against Bohn was 143% of his net income. John Merzlock testified that his net income from **all** sources was less than $75,000 per year. R. Vol. IV, p. 3631, l. 15-16. Only a portion of that amount was from the sales of homes. The punitive damages assessed against Merzlock were $58,373.

Landmark Real Estate's net income averaged $46,256 for the involved years, 1997, 1998, and 1999. That is a total of $138,770. Pl. Ex. 65. Yet, the jury awarded punitive damages of $800,000 against Landmark Real Estate. That is 576% of the net income. Clearly, the punitive damage awards are disproportionate to the Appellants' income and must be remanded on appeal as they were not set aside upon post-trial motion.

Further, the United States Supreme Court has recognized that punitive damages are aimed at the purposes of deterrence and retribution, and that the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a party. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003). In reviewing punitive damage awards, the U.S. Supreme Court has instructed courts to consider: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 418.

In making a determination with regard to the first consideration, a defendant's reprehensibility, the Supreme Court stated:

> The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff

> may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.
>
> Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. . . . While we do not suggest that there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

Id. at 419.

Here, any harm to Kuhn or the Scheis was economic rather than physical. At no time did the Defendants' conduct evince an indifference or a reckless disregard for the health or safety of others. Additionally, this situation was an isolated incident. There was no evidence that this type of conduct has occurred before or since. The conduct, as found by the jury, may have resulted from intentional conduct rather than negligence, but it cannot be said that the Defendants' culpability is so reprehensible as to warrant the imposition of sanctions beyond compensatory damages. Certainly, a more modest punishment could have satisfied the State's legitimate objectives.

In determining the second consideration, the disparity between the actual or potential harm suffered by plaintiffs and the punitive damage award, the U.S. Supreme Court stated:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or

> potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ration which a punitive damage award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . .
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Id. at 424-425.

Here, the compensatory damages are substantial, $179,219.64 in favor of Kuhn against these Defendants and $84,483 in favor of Scheis against these Defendants. The ratio of compensatory damages to punitive damages is 3.1-to-1 as to Kuhn and 4.3-to-1 as to Scheis. Although these are single digit ratios, they are beyond the outermost limit of due process due to the substantial nature of the compensatory damages.

Additionally, with regard to the calculation of these ratios, it might be argued that the ratios are too small considering that the compensatory damages include damages attributed by the jury to a Defendant, Kelly Fisher, against whom punitive damages were not allowed. Also, when approached from the Defendant Coldwell Banker's point of view, it was attributed none of the negligence with regard to percentage of fault, and with regard to breach of contract, Coldwell Banker is not even listed. R. Vol. II, p. 307-313. The only actual damages it appears they were responsible

for according to the jury is the refund of the commission paid in the amount of $11,825.00. *See* R. Vol. II, p. 307-313. Yet the jury found punitive damages against Coldwell Banker in the amount of $800,000. As to Coldwell Banker individually, that results in a net ratio of 68-to-1.

The Supreme Court concluded its analysis in *Campbell* by stating that the proper application of the three considerations in that case would most likely justify a punitive damages award at or near the compensatory damages amount. For the same reasons as those analyzed in*Campbell,* the punitive damage award in this case should be no more than the compensatory damages amount.

IV. The District Court erred in its rulings regarding the Defendants' post-verdict motions

Defendants filed a number of post-verdict motions in this matter. The motions were timely filed and called for an amendment or alteration of the judgment; a judgment notwithstanding the verdict; a new trial; and a 60(b) motion for relief from the judgment. With the exception of a small reduction in award based on relative fault attributed to third parties, the district court denied all the motions set forth by Appellants.

A. The District Court should have found that the evidence supported amending or altering the judgment pursuant to Idaho R. Civ. P. 59(e).

IRCP 59(e) allows the trial court a mechanism to correct legal or factual errors occurring during trial as a matter of discretion. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, (1999). As set out above, the Supreme Court may review whether or not the trial court in granting or denying such a motion, abused the discretion given it. The judgment should first be altered with regard to the statements made by the Scheis' attorney Norman Reece. Reece specifically told the jury at the outset of his closing argument that his clients were not seeking to recover any damages relating to Manning Lane. He explained as follows:

> You'll note – I think **Roger testified to you he's not going to claim any damages from Manning Lane.** He was willing to take a hit on Manning Lane because he felt, based on what the defendants were telling him, he could recoup that.

> He was willing to enter into that and take a hit on it based on what the defendants were telling him, but **he has decided not to offer that into evidence for damages because he wants to make sure that you feel he's being honest with you** because he really is. He's trying to tell you what his heart of hearts feels he has incurred because of the conduct that happened here. [Emphasis added.]

Tr. Vol IV, p 3762, l. 23 - p. 3763, l. 10.

Reece told the jury to not consider damages associated with Manning Lane and he made no mention of such damages during his closing argument. This is important because Jury Instruction No. 1 specifically told the jury:

> The arguments and remarks of the attorneys involved in this case are intended to help you in understanding the evidence and applying the instructions, but they are not themselves evidence. If any argument or remark has no basis in the evidence, then you should disregard it. **However, there are two exceptions to this rule: (1) an admission of fact by one attorney is binding on his party; and (2) stipulations of fact by all attorneys are binding on all parties.** [Emphasis added.]

R. Vol. II, p. 315-316.

Scheis' counsel admitted that his clients were not seeking damages for the sale of Manning Lane. This admission was binding on the Scheis. Nevertheless, the Special Verdict allowed the jury to consider damages for the sale of Manning Lane in the form of a refund of part or all of the commission. R. Vol. II, p. 307-313. It is not surprising that the Special Verdict allowed the jury to consider the commission issue, because the admission occurred after the instructions were given. Nevertheless, the admission did occur and the purpose of IRCP 59(e) is to allow the trial court to correct this type of error, which it did not do. The Scheis testified that they paid the commission on Manning Lane. However, they also testified that they received the benefit of their bargain as to Manning Lane. They agreed to sell Manning Lane for $296,500 and they received that full amount. The Amended Restated Judgment must be altered or amended by deducting from the Scheis award the $11,825.00 awarded as a partial refund of the real estate commission paid by the Scheis to

Landmark Real Estate. This error was not resolved by the trial court and now must be resolved on appeal.

Additionally, the economist testified that the Scheis lost $14,875 on the Deed of Trust from Kuhn. Tr. Vol. III, p. 2198, l. 6-18. The same economist testified that Kuhn lost $14,875 on the Deed of Trust to Scheis. *Id.*[3] In other words, the jury awarded the same damages twice. They paid Scheis for the loss of the Deed of Trust and they paid Kuhn for having to make a payment he never made. The Amended Judgment must be changed to deduct these monetary awards. *See* R. Vol. IV, p. 894-897. Because Kuhn never paid on the Deed of Trust, he should not be allowed to recover for making the payment. Kuhn's award should have been reduced by $14,875. Again, the district court failed to reduce the award pursuant to Idaho R. Civ. P. 59(e), and that was an abuse of discretion.

B. The District Court erred in not granting Appellants' motion for judgment notwithstanding the verdict.

Upon a Motion for Judgment Notwithstanding the Verdict, the moving party admits the truth of the opposing party's evidence and every legitimate inference that can be drawn therefrom. *Quick v. Crane,* 111 Idaho 759, 763-764 (1986); *Brand S. Corp. v. King,* 102 Idaho 731, 733 (1981). However, the trial court must look at all the evidence which was before the jury. It is error to rule on a Motion for Judgment Notwithstanding the Verdict based solely on the non-moving party's evidence. *See Hibbler v. Fisher,* 109 Idaho 1007 (Ct.App. 1985). The Court must decide whether the evidence is of sufficient quantity and probative value such that reasonable minds could reach the same conclusion as the jury reached. *Smith v. Praegitzes,* 113 Idaho 887, 890 (Ct.App. 1988). The evidence must be substantial and of sufficient quantity and probative value. *Bates v. Seldin,* 146 Idaho 772, 774 (2009). The determination of whether the evidence was sufficient to create an issue

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[3]The expert testified that he included as an element of damage promissory notes executed by both Kuhn and the Scheis to each other for the same amount. The expert testified that each was damaged in that amount and that the damage flowed from the transaction.

of fact is purely a question of law upon which the trial court makes its own ruling. *Quick*, 111 Idaho at 764. Where a claim is not supported by substantial evidence, it is error to deny a Motion for Judgment NOV. *See generally Brand S. Corp*, 102 Idaho 731. Here, Defendants are entitled to a Judgment NOV pursuant to IRCP 50(b) on either of these alternative grounds: (1) there was no evidence to show that the Defendants changed the documents, or lacked authority to sign the lease for the Kuhns; and (2) there was insufficient evidence to show that Defendants' conduct caused *any* damage to Respondents.

(1) No evidence to show that these defendants changed the documents or lacked authority to sign the lease. Plaintiffs claimed that the version of Exhibit 11 retained in Dave Fuller's file and the version of Exhibit 11 retained in First American Title Company's file differed from the version of Exhibit 11 in Coldwell Banker's file. Dave Fuller, the mortgage broker the Kuhns worked through to finance the property on Manning Lane, testified that he did not know who gave him the version of Ex. 11 that is in his file. Tr. Vol. III, p. 2873, l. 9-15. It could have come from one of the real estate agents, one of the plaintiffs, or it could have come from Jacquie Kuhn. Jacquie is the person he did most of his dealings with regarding the loan on Manning Lane. Tr. Vol. III, p. 2906, l. 23 - p. 2907, l. 8. Terri Small testified that she did not know who altered the version of Ex. 11 that is in her file. Tr. Vol. IV, p. 3124, l. 16-24. Because there is no evidence of who used the white-out or how the modified documents got into the files of Dave Fuller and First American Title, Defendants are entitled to a Judgment NOV. This is particularly true in light of the fact that the altered documents did not change the information given to the lender. There was no double contracting.

Idaho Code Section 54-2004(8) defines double contracting as:

> "Double contract" means two (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one of which is not made know to the prospective loan underwriter or the loan guarantor, to enable the buyer to obtain a larger loan than the true sales price would allow, or

> to enable the buyer to qualify for a loan which he or she otherwise could not obtain.

Here, Dave Fuller testified that the loan application given to the lender showed that the Kuhns were retaining ownership of Mountain Park and leasing or renting it to the Scheis. The version of Exhibit 11 in Fuller's file did not alter that fact in any way. It is a Purchase and Sale Agreement that does not mention Mountain Park. It shows that the Kuhns were buying Manning Lane and that nothing was being done with Mountain Park. When combined with the loan application provided to the underwriter, it clearly informed the lender that the Kuhns would own both properties as well as a third property, Rocky Point. *See* R. Ex. 11.

First American Title's version of Exhibit 11 reads exactly the same as the version in Coldwell Banker's file. White-out had been used on it, but the remaining language in Paragraph 5 has the exact same words as the version relied upon by the parties. Thus, the different versions of Exhibit 11 cannot be relied upon as proving fraud or damages.

Additionally, as will be shown later, Todd Bohn had permission from Jacquie Kuhn to sign the lease. This point was also an important one to Plaintiffs' case. They alleged that Todd Bohn signed it without permission, but there is no evidence on these issues to suggest that the Defendants did anything improper. *See* Tr. Vol. II, p. 1372, l. 14 - p. 1373, l. 10. Todd Bohn testified that Jacquie authorized him to sign the lease. Tr. Vol. I, p. 256, l. 4. Judge McDermott, though, instructed the jury to disregard this assertion. Tr. Vol. I p. 257, l.16-17. It is undisputed that Bohn signed the lease the same day that Jacquie signed Kuhn's name to Ex. 6, particularly anything that rises to the level required for punitive damages. Defendants are entitled to a Judgment Notwithstanding the Verdict because there is no evidence to dispute that Todd Bohn had permission from Jackie Kuhn to sign the Apartment Lease.

(2) Insufficient Evidence Regarding Causation. There is no evidence that any conduct or lack of conduct by these defendants caused damages to the plaintiffs. The Scheis claim that they were damaged when Mountain Park was foreclosed. Tr. Vol. II, p. 1945, l. 8-24. However, the

Scheis never owned Mountain Park. That foreclosure could not have gone against their credit record. All losses to the Scheis related to Mountain Park were related to their failure to exercise the option to purchase, not to any conduct by the Defendants. Therefore, the $166,000 to $189,900 of damages attributed to the Mountain Park foreclosure cannot be recovered by the Scheis. Even the economist testified that there were multiple other factors that caused the Scheis damages regarding increased interest expenses and lost profits on home construction, including the loss of Mr. Schei's job and the fact that they were building houses that were not supported by the local market. Tr. Vol. III, p. 2303, l. 15 - p. 2304, l. 23. That means there was insufficient evidence to support any damages awarded to the Scheis for those losses. The Scheis and Kuhn both sought to recover $14,875 for the loss of the Deed of Trust. R. Vol. II, p. 307-313; Tr. Vol. III, p. 2198, l. 3-22; Tr. Vol. III, p. 2209 l. 19 - p. 2210, l. 2. There is no evidence to support such a double payment. The only damages attributable to the Scheis and supported by the economist was the net payments on the Mountain Park lease of $27,621.00. Tr. Vol. III, p. 2276, l. 25 - p. 2277, l. 2. No other damages can be awarded to the Scheis.

Darren Kuhn claimed he was damaged when Mountain Park was foreclosed. R. Vol. I, p. 39. However, it is undisputed that the foreclosure occurred when the Scheis failed to make their lease payments and Kuhn failed to make his mortgage payments. There is no evidence that the Appellants' conduct caused those damages. Even the economist testified that if Scheis had performed, then Kuhn would have no damages. Tr. Vol. III, p. 2273, l. 19 - p. 2274, l. 18. The economist further testified that he was not giving any opinion as to causation of the damages he discussed. Tr. Vol. III, p. 2232, l. 11-16; p. 2235, l. 15-18. There is insufficient evidence to support the jury's finding that Kuhn was injured because of the Appellants' conduct. A Judgment Notwithstanding the Verdict is warranted based on the complete lack of evidence of damages **caused** by the Defendants

C. The Trial Court erred in denying Appellants' Motion for New Trial.

Usually, as set out in the standard of review section above, the decision whether to grant a

new trial under Rule 59 is a question of discretion for the Trial Court. *See inter alia Chereny v. Agri-Lines,* 115 Idaho 281, 286 (1988). However, as discussed below, there are certain circumstances that require the granting of a new trial. The rule that a verdict will not be set aside when supported by substantial but conflicting evidence has no application to a motion for new trial. *See Dinneen v. Finch,* 100 Idaho 620, 626 (1979).

The Defendants' position on the appeal of the Motion for New Trial is that there are five grounds that require a new trial: (1) irregularity in the proceedings of the adverse party under Rule 59(a)(1); (2) newly discovered material evidence under Rule 59(a)(4); (3) error in law under Rule 59(a)(7); (4) an award of damages due to passion or prejudice under Rule 59(a)(5); and (5) an award of damages unsupported by the evidence under Rule 59(a)(6). The excessiveness of the punitive damages award was discussed above in conjunction with the argument that punitive damages should not have made it to the jury at all. The remaining arguments will be made below.

(1) Irregularity in the Proceedings by the Adverse Party. When a motion for new trial is based upon misconduct, the moving party has only the burden to establish that the misconduct occurred, the party opposing the motion is then required to establish that the conduct could not have affected the outcome of the trial. *Slaathaug v. Allstate Ins. Co.,* 132 Idaho 705, 711 (1999). An appellate court need not attempt to quantify the probability of a different result on retrial. It is sufficient that the error was prejudicial and that it reasonably could have affected the outcome of the trial. *Pierson v. Brooks,* 115 Idaho 529, 534 (Ct. App. 1989).

Here, Respondents were guilty of misconduct in several different instances. Kuhn lied about his knowledge of the Robert Jones appraisal. *See* R. Vol. III, p. 560- 565. Darren Kuhn hid the location of his ex-wife from Defendants despite a direct interrogatory regarding the location of all persons with knowledge. *See* R. Vol. III, p. 561; *See also* R. Vol. IV, p. 822-824. Darren Kuhn lied about his credit problems and hid documents regarding his credit history from Defendants despite a Request for Production for those documents. *See* R. Vol. III, p. 560-565.

Darren Kuhn testified under oath that he was not aware that Robert Jones performed an

appraisal on the Manning Lane house until it came up during the trial. Specifically, he said:

1. Until learning of it in this trial, did you know that Robert Jones had, in fact, done – well, let me back up. You knew he was going to do two appraisals?
A. I knew someone was supposed to do two appraisals.
Q. You didn't pick him?
A. No.
. . . .
Q. Did you play any part in picking Mr. Jones?
A. No.
Q. But you were agreeable to rely and trust Mr. Merzlock and Mr. Bohn to make a judgment call as to who would be a fair and common appraiser for both properties?
A. Yes.
Q. Did you at any time prior to hearing it in court, realize that the appraisal that Mr. Jones, in fact, came in with was $261,000?
A. No. I was never told of that appraisal.

Tr. Vol. IV, p. 3656, l.14 - p. 3658, l. 7.

This is an obvious lie as shown by the affidavits of Jacqueline Kuhn and Kelly Kumm. *See* R. Vol. III, p. 560-565 and 574-619. Todd Bohn recommended that the Kuhns use Robert Jones and they used Jones to get a low-ball appraisal. *Id.* at 562. When Darren Kuhn took the stand and testified that he knew nothing about Jones' appraisal until the trial, he lied. The fact is that he not only knew about that appraisal, he used it in his divorce case to undervalue the cost of the Manning Lane house. Darren's attorney in the divorce, Bron Rammell, provided the appraisal to Jaqueline's attorney, Kelly Kumm. R. Vol. III, p. 574-576. It was misconduct for Kuhn to lie on the stand.

Kuhn attempted to minimize and discredit the testimony provided by Jacquie and more specifically that of Kelly Kumm in the affidavits of Lowell Hawkes and Bron Rammel. *See* R. Vol. III, p. 854-861. The Hawkes affidavit, though, is fraught with hearsay. Defendants objected to the Hawkes affidavit and moved to strike it, but that motion was denied. R. Vol. IV, p. 866(c). It was abuse of discretion for the court to accept the Hawkes affidavit with all its hearsay and in effect

disregard the Kumm affidavit.

One of the major problems the Defendants faced at trial was their inability to produce Jacqueline Kuhn as a witness. This problem was compounded by the Court's refusal to allow the Defendants to testify about statements made to them by Jacqueline, which problem will be discussed in detail below. Appelants' inability to locate Jacqueline was due directly to discovery abuse by Kuhn. Defendants served discovery on Kuhn on April 25, 2001. R. Vol. III, p. 633-652. Interrogatory No. 1 requested that Kuhn provide the name, address, and telephone number of each person with knowledge of any facts of the case. Interrogatory No. 2 requested that Kuhn provide the name, address, and telephone number of each person he intended to call as a factual witness. Kuhn answered these interrogatories on July 31, 2001. In answering them, he identified Jacquie Kuhn as Jacquie Jordan (her new married name) and gave her address and telephone number as P.O. Box 460273, Huson, Montana 59846, (406) 626-4357. *Id.* Jacquie moved in November of 2001 to a new address and telephone number. Darren had Jacquie's new address and telephone number by November of 2001. *Id.* at 560-565. Under Idaho R. Civ. P. 26(e), Kuhn had an obligation to supplement his July 31, 2001 answers with Jacquie's new address and telephone number. Without that supplementation, the Defendants had no way to know that her address and telephone number had been changed and mail was not being forwarded. R. Vol. III, p. 561. Defendants had no way to know how to reach Jacquie. Rule 26(e) states:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
> (1) **A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity of persons having knowledge of discoverable matters** and . . .
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party

> knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. [Emphasis added.]

Kuhn never amended his response even though he knew that it was no longer true and his failure to amend is in substance a knowing concealment. In addition to the affidavit produced by Jacquie, common sense dictates that where Kuhn's children spent considerable time at Jacquie's new address, he must have known where it was.

Rule 26(e)(3) imposes a further duty to supplement discovery responses whenever the opposing party makes a new request for supplementation of prior responses. In this case, Defendants served a Demand for Supplementation on the Plaintiffs on October 4, 2002. *See* R. Vol IV, p. 822-824. Despite this request for an update of information, Darren Kuhn remained silent as to the location of Jacqueline Kuhn.

Defendants could not locate Jacquie without being privy to the information that only Kuhn had. The District Court, though, refused to grant the Defendants' motion for new trial due to the concealment. R. Vol. IV, p. 866(c). The District Court apparently found the testimony given by Jacquie by virtue of her affidavit unconvincing. *Id.* While the court below has discretion due to its having heard the witnesses, with regard to this affidavit, the lower court was in no better position to judge her veracity as are the Justices of the Idaho Supreme Court. But when newly discovered evidence of this nature comes after trial, through no fault of the moving party, fairness dictates allowing the jury to hear the new evidence and weigh it against the other testimony and evidence presented.

There is further evidence of misconduct on the part of the Plaintiffs. Both the Scheis and Darren Kuhn testified that Jacquie must have gotten the key to Manning Lane from Todd Bohn when they moved in. Tr. Vol. II, p. 1871, l. 15-20; Tr. Vol. II, p. 1477, l. 5-8. Once Jacquie contacted defense counsel, they learned that Roger Schei gave Jacquie the garage door opener. No one gave

her a key. *See* R. Vol. III, p. 563.

Kuhn's position at trial was that he had decent credit prior to the purchase of Manning Lane but that the foreclosure on Mountain Park destroyed his credit. He testified that his credit would have gone up from a "B" rating to an "A" rating but for the foreclosure. Tr. Vol. II, p. 1532, l. 13 - p. 1533, l. 1. In discovery, the Defendants requested that Kuhn provide copies of all credit reports for himself or his business. *See* R. Vol. III, p. 650. Kuhn provided a credit report for July 28, 1997 and a credit report for June 4, 2002. *Id.* at 654; *see also* R. Exhibits 302 and ZZZZ attached to original transcript. These were to constitute a "before and after" snapshot of his credit– before buying Manning Lane and after the foreclosure. He used these two reports to establish his damages and the expert used them in making in determination of damages. *See* Tr. Vol. III, p. 2245, l.16 - p. 2248, l. 18. However, after communicating with Jacquie Kuhn following the trial, the Defendants learned of a third credit report. Darren used this third report in his divorce case, but never provided it to Defendants in this case despite a clear and unequivocal discovery request that he do so. This third credit report is material because it is dated July 29, 1999, which is long after the Kuhns bought Manning Lane but only two months before the Scheis quit making lease payments on Mountain Park. That credit report shows that Darren Kuhn had a "C" rating even before the foreclosure on Mountain. Park. *See* R. Vol. III, p. 575, 585.

Any one of these "misconducts" would have altered the outcome of this trial had they not occurred. Any one of them is an adequate basis for a new trial. Taken together, they resulted in a gross miscarriage of justice and denying Appellants' motion for a new trial was a manifest abuse of discretion. Defendants are entitled to a new trial under Rule 59(a)(1).

(2) Newly Discovered Material Evidence. In Idaho, the rule is that when a party seeks a new trial based on newly discovered evidence, "it is essential ... that such evidence has been discovered since the trial and that it could not have been discovered before or during the progress of the trial by the exercise of due diligence." *See, Idaho Judicial Council v. Becker*, 122 Idaho 288, 297 (1992) (citing *Frederickson v. Luthy*, 72 Idaho 164, 168 (1951)).

The same facts that constitute misconduct constitute newly discovered material evidence in this case. Jacquie Kuhn's testimony was critical to Defendants' defense against the Plaintiffs' claims. Yet, Darren Kuhn hid Jacquie's whereabouts from the defendants or at least failed to disclose her whereabouts despite his duty to do so. Had Jacquie testified, she would have testified, consistent with her affidavit, that:

1. She gave Todd Bohn permission to sign the apartment lease and showed that lease to Darren Kuhn a few days after it was signed.
2. The Kuhns knew before they closed on Manning Lane that they were leasing Mt. Park to the Scheis.
3. Roger Schei gave her the garage door opener before the closing so that the Kuhns could move into Manning Lane.
4. The Kuhns knew all about Robert Jones' $261,000 appraisal on Manning Lane and they presented that appraisal to the Scheis to get them to come off of the $350,000 asking price.

See R. Vol. III, p. 560-565.

Additionally, if her whereabouts had not been concealed from Defendants, the credit report would also have come to light.

This new evidence was not available to Defendants prior to trial. Jacquie herself stated in her affidavit that both Bron Rammell and Darren Kuhn knew her new address prior to trial. *Id.* She further testified that she was afraid that if she testified for the Appellants at trial, Darren Kuhn would try to take their children away from her. *Id.* Due diligence would not have found this witness prior to trial. She was only found after trial because she contacted defense counsel. *Id.* Defendants are entitled to a new trial under Rule 59(a)(4).

As with Kuhn's claim of ignorance regarding knowledge of the appraisal, a simple affidavit from Kuhn could have provided a good explanation, if there were one, of why Jacquie's whereabouts were kept from the Defendants and why the credit report was not provided when asked for. Whether Jacquie's whereabouts were kept from Kuhn's counsel or whether Kuhn's counsel kept them from the Appellants, there was no way due diligence would have allowed discovery of her whereabouts. Indeed, as there is a standing rule of civil procedure compelling a party to disclose a change of

address and the Defendants demanded a supplementation to the discovery responses provided by Respondents, the standard of due diligence has been met. The Defendants should have been able to rely on the fact that if Kuhn knew of his ex-wife's whereabouts, he would have let them know.

(3) Error of Law. Idaho Rule of Civil Procedure 59(a)(7) provides that the trial court may grant a new trial for "error in law, occurring at trial." The trial court has a duty to grant a new trial under IRCP 59(a)(7) where prejudicial errors of law have occurred, even though the verdict is supported by substantial and competent evidence. *Schaefer v. Ready*, 134 Idaho 378, 3 P.3d 56 (Ct. App. 2000).

Here, there were three errors of law that prejudiced these defendants. First, the Court erred by not applying the Statute of Frauds to the Respondents' claim that the parties entered into an agreement whereby Defendants would buy Mt. Park if it had not sold within one year.[4] Second, the Court erred by allowing Plaintiffs to call an expert witness to discuss whether the Defendants' conduct was in violation of the appropriate standard of care.[5] Third, the Court erred by not allowing Defendants to testify as to statements made to them by Jacqueline Kuhn.

Idaho Code § 9-505 states that an agreement is invalid, unless it is in writing and signed by the party charged and evidence of the agreement cannot be received without the writing, when that agreement "by its terms is not to be performed within a year from the making thereof . . . or [is] an agreement . . . for the sale, of real property." Darren Kuhn took the position as testified by his attorney Bron Rammell that there was an agreement between his attorney, Bron Rammell, and Kelly Fisher that Coldwell Banker would buy Mountain Park if it did not sell within one year. Tr. Vol. II, p. 1640, l. 2-15. Roger Schei claimed that John Merzlock made the same promise to him. Tr. Vol.

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[4]Plaintiffs' Amended Complaint makes no reference to this alleged contract. Therefore, Defendants' Answer does not raise the Statute of Frauds as an affirmative defense. However, the issue was tried to the jury and a motion to conform the pleadings was granted.

[5]That argument has already been taken up in Section II above.

III, p. 2388, l. 1-10. This testimony was objected to by Defendants as being in violation of the Statute of Frauds and should never have been heard by the jury. *See* Tr. Vol. II, p. 1631 l. 12 - 1638, l. 23. There should have been no evidence allowed as to this agreement due to Idaho Code § 9-505 for two different reasons. First, by the very nature of the agreement, performance of it cannot have taken place within one year. Coldwell Banker's obligation in the agreement cannot have arisen within a year, so its performance cannot possibly take place within that same year. Additionally, though this is a contingent agreement, it is still an agreement for the sale of real estate. The statute of frauds should clearly have kept evidence of this agreement out for both of those reasons. Once the Court allowed the testimony to go to the jury, Defendants submitted a proposed jury instruction that set forth the Statute of Frauds. *See* R. Vol. II, p. 302. The Court's refusal to give that instruction further compounded the error on this issue.

Several times during trial, Defendants attempted to testify regarding statements made to them by Jacqueline Kuhn. *See* discussion *infra* Part V. Plaintiffs claimed that such statements were hearsay. Defendants argued, as will be discussed below, that they were admissions by a party-opponent. Darren Kuhn testified that he gave Jackie authority to enter into contracts in his name. She was acting as his agent throughout the events that led to this lawsuit. *See* discussion *supra* Part IV.B.1. Under Rule 801(2), the Court erred in not allowing the Defendants to testify regarding statements made by Jacquie. Improper admission of evidence is a proper ground for a new trial under Rule 59(a)(1). *See, Pierson v. Brooks,* 115 Idaho 529 (Ct. App. 1989). Consequently, the improper exclusion of admissible evidence should also be a proper ground for a new trial under Rule 59(a)(1). The trial court has a duty to grant a new trial where prejudicial errors of law have occurred, even though the verdict is supported by substantial and competent evidence. *Schaefer v. Ready,* 134 Idaho 378, 380 (Ct. App. 2000). Defendants are entitled to a new trial because of the errors of law set out above.

(4) Amount of Damages Due to Passion or Prejudice. When making a Rule 59(a)(5) motion for new trial, the moving party is not required to point to the record and demonstrate

some particular occurrence which creates jury passion or prejudice. *Dineen v. Finch,* 100 Idaho 620, 624 (1979); *Stewart v. Rice,* 120 Idaho 504, 508 (1991). Instead, the Trial Court **must** weigh the evidence, determine the amount it would have awarded, compare that amount with the jury's award, and determine whether the disparity between the two awards is so great it shocks the conscience of the Court. *Pratton v. Gage,* 122 Idaho 848, 853 (1992). The rule that the verdict will not be set aside even when supported by substantial but conflicting evidence has no bearing on a motion for new trial under Rule 59(a)(5). *Dineen,* 100 Idaho at 624. Even if the jury's verdict is supported by substantial, competent evidence, a new trial should be granted if the jury verdict is excessive and the disparity between the two awards shocks the conscience. *Sanchez v. Galey,* 112 Idaho 609, 615 (1986).

The issue is not whether there is substantial, competent evidence to support the jury's verdict. Instead, the issues are whether it is apparent that there is a great disparity between the two damage awards and whether that disparity can be explained away simply as the product of two separate entities valuing the proof of injuries in two equally fair ways. *See Pratton v. Gage,* 122 Idaho 848, 850-51 (1992); *Quick,* 111 Idaho at 769. If the trial judge believes that the jury's verdict resulted from passion or prejudice, then he should grant a new trial under Rule 59(a)(5). *Pratton,* 122 Idaho at 851. Of course, if a trial court has abused its discretion, the appropriate appellate court must overturn the decision.

The standard to be followed by a Trial Court when faced with a Rule 59(a)(5) motion was established in *Dineen*:

> A trial court in a jury trial hears exactly the same evidence as the jury hears, and makes his own inward assessments of credibility and weight. So, when after a trial the jury returns a verdict which is thereafter assailed, either as excessive or as inadequate, the trial court's judgment is then called into play, requiring of him a *weighing* of the evidence. The sole question on a Rule 59(a)(5) motion is the amount of the jury's damage award, as compared to the amount of damages the trial court on his view of the evidence would have

> awarded. Where the disparity is so great as to suggest, but not necessarily establish, that the award is what might be expected of a jury acting under the influence of passion or prejudice, the court will in the interests of justice grant a new trial. . . . [Emphasis in original.]

Dineen, 100 Idaho at 624-25. The Court in *Collins v. Jones*, 131 Idaho 556 (1998), confirmed the trial court's "duty to weigh the evidence and make an assessment of the credibility and weight of that evidence." *Collins*, 131 Idaho at 558.

The *Dineen* standard was re-affirmed in *Pratton v. Gage*, 122 Idaho 848 (1992):

> It is now well established that when a motion for a new trial is premised on inadequate or excessive damages, the trial court *must* weigh the evidence and then compare the jury's award to what he would have given had there been no jury. If the disparity between the two amounts is so great that it appears that the award was given under the influence of passion or prejudice, a new trial should be granted. This is a subjective standard – the granting or denial of the new trial is premised on the trial judge's belief that the inadequacy or excessiveness of the award resulted from passion or prejudice.

Pratton, 122 Idaho at 852.

In *Quick v. Crane*, 111 Idaho 772, 727 P.2d 1200 (1986), the Supreme Court added the requirement that the trial court must state its reasons for granting or denying a Rule 59(a)(5) motion:

> An appellate court should not focus primarily upon the outcome of the discretionary decision below, but upon the process by which the trial judge reached his decision. In order for the appellate court to perform this function properly, it must be informed of the reasons for the court's decision. Unless those reasons are obvious from the record itself, they must be stated by the trial judge.

Quick, 111 Idaho at 772. Finally, in *Pratton*, the Court explained how the trial court could adequately state its reasons:

> It is not sufficient, however, to merely recite the language of the statute. While the trial court is not required to state the dollar amount it would have awarded, the ruling must show that the trial court has

> weighed the evidence, determined the amount he would have awarded, compared that amount with the jury's award, and found the disparity so great that it shocks the conscience of the court. [Citations omitted.]

Pratton, 122 Idaho at 853.

Here, the jury awarded Scheis a total of $453,163.18 and Darren Kuhn a total of $748,746.68. That is $1,201,909.90 for a case involving two houses that combined are only worth $471,500.00. It is clear, on its face, that the jury's decision was based on passion or prejudice rather than the evidence. The jury verdict should not be allowed to stand. The disparity between what was awarded and what should have been awarded is so great, it shocks the conscience.

Despite all this, the court denied the motion and gave the following as reasoning for such denial:

> To grant a new trial due to passion or prejudice the Court must weigh the evidence, determine what amount it would have awarded, and determine whether the disparity between the two is so great as to shock the conscience of the Court.
>
> The Court finds that in weighing the evidence that there would not have been such a disparity between what the Court would have awarded and what was awarded by the jury to be so great that the difference could only be explained that the jury's award was based on passion, prejudice or that it would have shocked the conscience of the Court.

R. Vol. IV, p. 866(i).

This is not a sufficient justification for denying the motion, nor is there a good reason for its denial. It was an abuse of the trial court's discretion.

(5) Award Unsupported by Evidence. On a motion for new trial pursuant to IRCP 59(a)(6), the trial court may grant a new trial when it is satisfied the verdict is not supported by the evidence or is convinced the verdict is not in accord with the clear weight of evidence. *Blaine v. Byers,* 91 Idaho 665, 671 (1967); *Pratton v. Gage,* 122 Idaho 848, 852 (1992). The standard is

similar to the standard for Judgment NOV and the insufficiencies in the evidence discussed above relative to a Judgment NOV apply here. The clear weight of the evidence admitted at trial does not support the jury verdict. The damages were caused when the Scheis quit paying their lease payments and Kuhn failed to make his mortgage payments. For all of these reasons, Appellants are entitled to a new trial pursuant to IRCP 59(a).

D. The District Court erred in its Rulings regarding Appellants' Motion for Relief pursuant to Idaho R. Civ. P. 60(b).

Rule 60(b) authorizes the Court to set aside a judgment for fraud, if the motion is filed within six months of the date of judgment. For both of these reasons, Appellants sought for, but were denied relief pursuant to this rule. The court's ruling on that matter was error. Rule 60(b)(3) allows the Court to set aside the Judgment if there has been fraud, misrepresentation or other misconduct of an adverse party and the motion to set aside is filed within 6 months of the judgment. Rule 60(b) also allows the Court to set aside the Judgment if there has been fraud upon the Court and an independent action to set aside is filed within 1 year of the judgment. Thus, Rule 60(b) covers two different types of fraud, fraud against a party by the adverse party or fraud upon the court by anyone.

The term "fraud upon the Court" is more than just interparty misconduct. In Idaho it has been held to require more than perjury or misrepresentation by a party. *See, Compton v. Compton*, 101 Idaho 328, 334 (1980). In *Compton*, the Court held that such fraud "will only be found in the presence of such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public." *Compton*, 101 Idaho, at 334. In discussing what type or amount of fraud is sufficient to justify setting aside the judgment, the *Compton* Court stated:

> We agree that the distinction between intrinsic and extrinsic fraud is simply another way of phrasing the question, and is of limited utility in actually resolving it. The task remains to strike a balance between two competing interests. On the one hand rests the need for finality of actions. On the other is the decidedly unsavory "spectacle of the

> law bearing down mercilessly, and perhaps ruinously, to collect and deliver over the fruits of undoubted fraud. Invoking oversimplified definitional concepts does not materially aid in accomplishing this task. [Citations omitted.]

In a more recent case, *Golder v. Golder*, 110 Idaho 57 (1986), the Court described the balancing of competing interests as the need for finality of judgments vs. justice – the courts' reluctance to serve as a shield in the perpetration of a fraud.

In *Artiach Trucking v. Wolters*, 118 Idaho 656 (Ct.App. 1990), the Court of Appeals addressed a claim of fraud based upon Wolter's claim that Artiach Trucking engaged in subterfuge during discovery. Artiach Trucking had loaned money to a corporation in return for two mortgages, one on land in Oregon and the other on land in Idaho. The Idaho land had been deeded to the debtor on the mortgage by the Wolters. The debtor disappeared with the money and without repaying the loans. Artiach brought suit in Idaho to foreclose on the property located in Idaho. It also brought suit in Oregon to foreclose on the property located there. In discovery in the Idaho case, the Wolters asked Artiach about the Oregon lawsuit. Wolters and Artiach reached a stipulated judgment on the Idaho lawsuit, but Wolters later moved to set aside that judgment, alleging that Artiach's discovery responses were fraudulent. The Court stated:

> The Wolters contend that there was subterfuge by Artiach's attorney in not adequately informing the Wolters, after being served with interrogatories, of the possibility of recovery on the Oregon property. The Wolters assert that had they known that Artiach ultimately had been able to achieve some recovery in Oregon, they would never have settled with Artiach for the sums in the stipulated judgment.
>
> We do not believe these circumstances create the fraud or misrepresentation envisioned in Rule 60(b). The responses to the Wolters' interrogatories may have been inadequate, in the Wolters' view, but they were not fraudulent. Our examination of the record reveals that Artiach's interrogatory answers, although less than perfect, nevertheless provided the Wolters with access to all the information they eventually used to bring this motion. The

> interrogatories, together with Artiach's informal communications, told the Wolters the name of the Oregon counsel, the location of the property, the venue of the Oregon litigation, and the existence of a prior first mortgage on the property. One interrogatory answer told them the Oregon action was "proceeding in the normal course." If the Wolters had followed up on the answer, they could have obtained all the information that was subsequently revealed to them and on which they brought this motion.

Id. at 658.

The Court also looked at Wolters' claim that Artiach's failure to supplement its discovery responses constituted fraud. The Court held that Artiarch had no duty under Rule 26(e) to supplement its responses to the interrogatories. The responses were not incorrect when made and the failure to amend did not constitute a knowing concealment. However, there was no claim by Wolters of any change in the identity or location of persons having knowledge. Therefore, Rule 26(e)(1)(A) was not involved.

In the instant case, Rule 26(e)(1)(A) is clearly involved. Kuhn responded to Defendants' interrogatory regarding persons with knowledge by giving us the name, address, and telephone number of Jacquie Kuhn. Darren Kuhn knew she moved and knew her new location and telephone number. However, he never supplemented his discovery responses, even though the rule required him to and even though Defendants served a demand for supplementation. *See* discussion *supra*, part IV.C. This case differs from *Artiach* in that Kuhn's failure to supplement is a knowing concealment and is a violation of Rule 26(e).

Rule 60(b)(3) are designed to prevent injustice. There is no question that Darren Kuhn committed perjury, hid evidence and information about a material witness, and hid information about his credit rating. *See* discussion *supra*, part IV.C. It also appears that Mr. Rammell knew about the missing credit report, after all he used it in the divorce proceeding. *See* R. Vol. III, p. 574-620. He knew that Jackie had moved and he knew her new telephone number and address by November of 2001. *See* R. Vol. III, p. 560-565. Despite that knowledge, he let his client answer

discovery without disclosing the information or documents and he let his client give perjured testimony. The trial court's ruling on this matter must be reversed for fraud upon the court and upon the adverse party.

V. The District Court erred in a number of its Evidentiary Rulings.

As already discussed above, the district court erred in its ruling with regard to allowing Respondents' expert to testify as to whether or not the Defendants' conduct was outrageous. Additionally, it was error to not allow witnesses to testify as to statements made by Jacquie Jordan, as an agent of Plaintiff, Darren Kuhn. Defendants argued that such statements were admissions by a party-opponent. The Court ruled otherwise and stated that if we wanted Jacquie's testimony, we should have produced her as a witness.[6] Tr. Vol. I, p. 254, l. 8 - 258, l. 1. Indeed, despite all the foregoing with regard to Jacquie's whereabouts, Mr. Hawkes remarked that "she is available" as if Defendants could have simply contacted her for testimony. He said "This is [sic] lady who was available. She is available for by [sic] en [sic] they'll [sic] available for deposition albeit outside Montana." Tr. Vol. III, p. 2886, l. 18-20. As discussed above, however, she was not available. Her whereabouts were kept from Defendants despite an affirmative request for supplementation and despite a duty to supplement under the rules. Idaho Rule of Evidence, Rule 801 defines admissions by a party-opponent:

> (2) Admission by party-opponent. The statement is offered against a party and is . . . (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship, ...

The Court even instructed the jury that one spouse is the agent of the other spouse for purposes of signing contracts and agreements which convey or encumber real property of the marital community.

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[6]As discussed above, this was not possible considering that Plaintiffs did not disclose her whereabouts to Defendants.

See R. Vol. II, p. 335. The Idaho Supreme Court has longstanding precedence indicating that "a husband may constitute his wife his agent and render her acts, within the scope of her apparent authority, binding on him." *Carron v. Guido*, 54 Idaho 494 (1934); *See also First Sec. Bank of Idaho v. Hansen*, 107 Idaho 472 (1984). The affidavit of Jacquie Kuhn indicates that she was given authority to act as her husband's agent. She indicates:

> I was actively involved in the purchase of the house at 13235 Manning Lane and in the lease of the house at 712 Mountain Park. . . . I handled most of the transaction because Darren was gone so much. However, I kept Darren informed of what was going on and I had his approval on everything I did. . . . Darren was out of town on August 18, 1997, when I signed the Purchase and Sale Agreement that is dated 8-18-97 and which bears the ID# 188424. I signed Darren's name to that Agreement, as I often signed his name to documents when he was out of town. I had his permission to sign that agreement and to do what I felt was necessary to facilitate the purchase of Manning Lane.

R.Vol. III, page 562.

Further, Kuhn admits he gave Jacquie authority to sign his name on his behalf. One of the primary arguments relied upon by the Plaintiffs was that Todd Bohn lacked authority to sign Exhibit 7 on behalf of the Kuhns. However, the evidence was undisputed that Jacquie Kuhn acted as Darren's agent in much of this transaction. *See* Tr. Vol. II p. 1515, l.1 - p. 1517, l. 10. She signed his name to contracts when he was out of town. Jury Instruction No. 19 specifically informed the jury that a spouse can be the agent of the other spouse. Darren Kuhn testified that he gave his wife authority to sign his name and to enter into real property contracts in his behalf. Specifically, he testified:

Q. Jackie signed your name to Exhibit 5?
A. Yes.
Q. And she did that on August 5th?
A. Yes.
Q. And she did that without you ever having seen Exhibit 5, didn't she?

A. Yes.
Q. Why would she sign your name to that document?
A. Because it was during the day and I was out of town.
Q. Did she have your permission to sign it?
A. She called me on the phone.
Q. Okay. So she had your permission?
A. Yes.
Q. Look at Exhibit 6, that's not your signature either, is it?
A. No.
Q. Jackie again signed your name to that document?
A. Yes.
Q. Were you out of town again?
A. I'm sure I was.
Q. Did she have your permission to sign your name to Exhibit 6?
A. Yes.
Q. What is the date on August 6th?
A. Obviously, August 6th.
Q. I'm sorry – every year– what's the date on Exhibit 6?
A. August 18th.
Q. And that's the same date as the apartment lease was signed, isn't it?
A. Yes.
Q. Look at Exhibit 7 – August 18th; right?
A. Oh, when it was signed, yes.
Q. So Exhibit 6 and Exhibit 7 were both signed on August 18th and you were out of town that day?
A. Yes.
Q. And you had given Jackie permission to sign Exhibit 6?
A. Yes.
Q. So she signed Exhibit 6 the same day that Todd signed on your behalf on the lease; right?
A. It appears that way.
Q. And you heard Todd's testimony that he had Jackie's permission to do that, didn't you?
A. I heard that.
Q. Now, you weren't even there when Exhibit 6 was signed; correct?
A. No.
Q. So you don't know what took place then?
A. No.

Tr., Vol. II, p. 1515, l.1 - p. 1517, l. 10.

That admission is tantamount to an admission that she was acting as his agent. Exhibits 5, 6, and 7 were all signed by Jacquie on Kuhn's behalf while he was out of town. Tr. Vol. II, p. 1514, l. 22 - p. 1516, l. 22. And that admission came during the course of the trial. That means that statements made by her are, pursuant to Idaho Rule of Evidence 801, admissions by a party opponent and are admissible. The statements made by Jacquie Kuhn in her affidavit concern the sale of the houses, which was encompassed in the authority Kuhn gave her. Those statements, if allowed, would have provided the jury with much additional evidence and almost surely would have affected the verdict it rendered. However, when Defendants attempted to testify regarding statements made by Jacquie to them, they were ruled out as hearsay despite the aforementioned Rule of Evidence. Tr. Vol. III, p. 2886, l. 3 - p. 2887, l. 10. The exclusion of those statements created an unfair situation and their exclusion was clearly improper.

The next error made by the court with regard to evidentiary issues has to do with the exclusion of the testimony of Les Lake. Following much of the procedure alleged by the Scheis and Kuhn, the Scheis filed a complaint with the Idaho Real Estate Commission. Tr. Vol. IV, p. 3096, l. 9-12. Mr. Lake was commissioned to investigate the complaint. *Id.* The court did not allow the witness to testify before the jury. The original objection lodged by Mr. Hawkes in this case was with regard to a letter Mr. Lake issued in response to the complaint finding that the agents had done nothing wrong. As the offer of proof showed, Mr. Lake would have testified consistently with the letter. Tr. Vol. IV, p. 3093, l.2 - p. 3099, l.6.

There is no justification for not allowing Mr. Lake to testify as to the investigation he performed. Indeed, Mr. Hawkes admitted earlier in the proceedings that, while the letter is hearsay, a person's testimony as to the investigation should be admissible. He, himself, explained "well, the letter, of course, isn't admissible by itself. It's a hearsay document, but I think they can bring people to address the same issue . . . . but I agree your Honor, that they would be permitted to bring in somebody who could be cross-examined. A piece of paper can't." Tr. Vol. III, p. 2476, l. 16 - p.

2477, l. 4. Additionally, the court stated at more than one point, that the letter must be admitted on principles of fairness if Respondents' expert was allowed to testify. Tr. Vol. II, p. 1933, l. 3-8. She was allowed to testify, but the letter was not allowed into evidence even through its author. Tr. Vol. II, p. 1933, l. 3-8.

And yet, when Mr. Lake was brought in to testify, Mr. Hawkes did object. His objection, though, changed from hearsay issues to arguing that he did not know to what Mr. Lake would be testifying. Tr. Vol. IV, p. 3104, l. 5-21. This objection, though convoluted appears to reference some lack of disclosure of items or information relied upon in performing the investigation. But if there was something lacking in the investigation performed by Mr. Lake, Mr. Hawkes could certainly have exposed that on cross-examination. He could have deposed the witness as well as Mr. Lake was disclosed by the Defendants as a witness. In addition, the door was opened in opening statements when counsel for the Scheis alleged that the conduct of the Defendants was grounds for revocation of their real estate licenses. Tr. Vol. I, p. 134, l. 15-20. Certainly, the Defendants should have been allowed to rebut that assertion with the facts that there was an investigation and their licenses were not revoked.

The court never really gave its reasoning for disallowing the testimony or the letter. Judge McDermott simply indicates he is trying to follow the rules. Tr. Vol IV, p. 3108, l. 21-24. There is no definite explanation as to why the witness was to be excluded completely though there is some mention of relevance. Tr. Vol IV, p. 3099, l. 11-14. That Mr. Lake's testimony as an investigating agent into the conduct of real estate agents against whom there is alleged negligence and a breach of their fiduciary duty, is not relevant, is unfathomable. "Relevant Evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Idaho R. Ev. 401. Considering the number of alleged misdeeds, the testimony of an investigating body of what it did to investigate the matter and what it found as a result of its investigation, would have great bearing on how the jury sees the alleged deeds of misconduct. Mr. Lake also spoke with the Scheis,

Todd Bohn, Kelly Fisher, and John Merzlock, but his testimony as to those conversations, much of which would have been admissible as non-hearsay admissions by party opponents was excluded.

All of these evidentiary rulings are error and none are harmless. The court's errors in this regard were abuses of discretion and in some instances, as with regard to Mr. Lake's testimony, the court gave virtually no explanations as to why it was ruling the way it did. Each of the above errant evidentiary rulings are grounds for a reversal and a remand for a new trial.

VI. The District Court erred in its Rulings Regarding Jury Instructions given and those refused along with the Special Verdict Form.

This brief has already detailed the reasons why the statute of frauds should have kept any evidence of the alleged agreement between Kelly Fisher and Bron Rammell, regarding the purchase of the property by Coldwell Banker, away from the jury's ears. *See* discussion *supra* part IV.C.3. That same reasoning applies to why the lower court erred in not allowing a jury instruction with regard to the statute of frauds.

The statute of frauds was obviously applicable and, if the court was going to overrule the Defendants' objection as to evidence set forth regarding this alleged agreement, it certainly should have at least provided the jury with an instruction for the statute of frauds. This was a clear error of law. The Defendants' proposed jury instruction number 19 was not included in the court's final jury instructions. Counsel objected to the exclusion of the instruction and the inclusion of the instruction regarding contracts in general without the caveat of the statute of frauds. Tr. Vol. IV, p. 3689, l. 8-21. The court responded to the objection by saying the following:

> The testimony was that– there was allegedly an agreement, but it's disputed. But Mr. Rammell reduced it to writing and sent it over to Kelly Fisher and it never was signed.
>
> I don't think under all the facts of this case, I don't think giving an instruction on Statute of Frauds would be appropriate. It think it would just confuse and mislead the jury, but your objection is noted.

Id. at p. 3689, l. 22 - p. 3690, l. 6.

This is not an issue of discretion. Where the statute of frauds was in issue, it was clear error not to give the jury an instruction on it. The court's failure to give an instruction certainly had something to do with the result returned by the jury with regards to the breach of contract. Indeed, in closing argument, the attorney for the Scheis reminded the jury that the Scheis were from a generation "who were raised with the ethic that a person's word is their bond, an ethic that you didn't need a promise to be in writing, your word and a handshake were enough." Tr. Vol. IV, p. 3866, l. 9-12. Whatever the Scheis may feel about the value of a promise, the law dictates that a promise like the one in question (which was only allegedly made) be made in writing or it is not enforceable and the judge ignored it.

Finally, the special verdict form provided by the court to the jury in this matter is convoluted and confusing. After going through whether or not there was negligence with regard to each of the Defendants except for Coldwell Banker, and setting out what percentage of fault should be assigned to each Defendant except for Coldwell Banker, question 13 includes Coldwell Banker in the total damages for breach of a fiduciary duty and negligence. R. Vol. II, p. 311. This with no percentage of fault assigned to them.

Additionally, it allows for double recovery where the damages are one and the same. The damages for a breach of contract in not buying the house when it could not be sold pursuant to the alleged oral agreement, are the same as a negligence claim or breach of fiduciary duty. The special verdict form allowed for double recovery. Further, although Coldwell Banker is not listed in questions 17 and 18 of the special verdict form for the jury to make a decision as to whether it breached a contract with Kuhn or the Scheis, yet the final judgment gave the Plaintiffs a claim against Coldwell Banker for the amount the jury awarded against all the other Defendants for breach of contract. *See* R. Vol. IV, p. 895. Even the judge apparently could not decipher the verdict form.

VII. The Award of Attorney's Fees is Improper and the Amount Awarded Plantiffs in this Matter is Unreasonable and should be reversed.

The court in this matter awarded attorney's fees on the basis of the contract pursuant to Idaho

R. Civ. P. 54(e). The court found no statutory basis for the award of attorney fees in this case. Furthermore, the Plaintiffs cannot establish a contractual right to attorney fees in this case. The Supreme Court has stated the following about the award of attorney fees:

> While I.R.C.P. 54(d)(1) grants costs to a litigant who is the 'prevailing party,' this Court has held that we adhere to the so-called 'American rule,' which holds that, except for sanctions and the private attorney general doctrines, attorney fees are created only by statute or contract, and that Rule 54(e) neither creates a right to attorney fees, nor diminishes any right created by statute or contract. I.R.C.P. 54(e)(1)-(5); *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984); *Idaho Power Co. v. Idaho Public Util. Comm'n* , 102 Idaho 744, 750, 639 P.2d 442, 448 (1981)('[A]ttorney fees cannot be recovered in an action unless authorized by statute or by express agreement of the parties. *Kidwell v. Fenley*, 96 Idaho 534, 531 P.2d 1179 (1975).'). (Emphasis added.)

Farm Credit of Spokane v. Wissel, 122 Idaho 565, 569 (fn 4) (1992). Therefore, as there is no statutory basis for the award of attorney fees in this case, the Scheis and Kuhn were reduced to having to establish an express contractual agreement for the payment of attorney fees in order to prevail on this claim.

The court at the suggestion of the Scheis and Kuhn erroneously rely on the Exclusive Seller Representation Agreements for the provision of an award of attorney fees. However, as above explained Kuhn and Schei simply did not assert that these Defendants breached their representation agreements to the jury, they asserted that these Defendants breached some alleged oral agreements to sell the Mountain Park property within a certain period of time, to purchase the Mountain Park property in the event that it did not sell within one year from the lease option agreement, and to indemnify the Kuhns. There was certainly no mention of an express agreement for the payment of attorney fees in these alleged oral agreements. Although the Defendants maintain that these oral agreements should not have even been presented to the jury, the Scheis and Kuhn consistently argued that these Appellants violated the oral agreements. Therefore, as there was never any agreement for

the payment of attorney fees by the Defendants, this Court should deny the Plaintiffs' request for attorney fees.

The amount of attorney's fees awarded to Kuhn and the Scheis is wholly unreasonable. Mr. Rammel was the attorney of record until he was disqualified because he became a witness. As Mr. Rammel failed to seek alternate counsel for his client at an earlier date, he added unnecessary and unreasonable sums to the attorney fees in this case. He should have known, given that his testimony is the one that gives rise to the alleged oral agreement, that he would have been a witness. The court has ordered that Appellants pay Mr. Hawkes catch up time, though he should have been involved in the case at the outset.

Furthermore, as this Court disqualified Mr. Rammell from trying this case, it is improper to award his duplicative attorney fees. Mr. Rammell has charged the Appellants for all his time sitting next to Lowell Hawkes during the trial despite the fact that he was disqualified from representing Kuhn. Indeed, the court made it clear during the course of the proceeding that he was not an attorney here, but rather a witness. At one point, outside the presence of the jury, when Mr. Rammell was a witness, he attempted to make a legal argument while sitting on the stand. The following then took place:

> THE WITNESS (Mr. Rammel): I just wanted to point out that I don't think it would be appropriate– they turned me into a witness in this case and they don't like what they found out, and I mean, that's what they get and –
>
> THE COURT: Well, hold it, okay, what they're going to get is –
>
> MR. HAWKES: Let's just go on, Bron.
>
> THE COURT: You're a witness, not an advocate, and what they're going to get is your testimony under oath; okay?
>
> WITNESS (Mr. Rammel): Absolutely.
>
> Tr. Vol. II, p. 1638, l. 9-21.

The court in one breath makes it quite clear that Mr. Rammel is not a lawyer in this matter, and in

the next agrees to compensate him as one for his "work" during the trial.

It is further interesting to note the difference in time and hourly rates charged by Mr. Rammell and Mr. Reece. Despite that fact Mr. Reece had at least as much or more experience than Mr. Rammell and had been involved in this case almost as long as Mr. Rammell, his time was only 423.40 hours and his rate was only $100.00 per hour. R. Vol. II, p. 459. Bron logged 545.5 hours at $150.00 per hour. R. Vol. III, p. 525. Clearly the amounts sought by Mr. Hawkes and Mr. Rammell are duplicative and unreasonable and should not be awarded as requested.

CONCLUSION

Many, if not each of the reasons stated above are sufficient to reverse this matter and remand it for a new trial. However, when taken in their entirety, there should no doubt that the errors of the court and the misconduct of the Plaintiffs along with the newly discovered evidence through no fault of the Appellants constitute more than enough grounds for a reversal. For those reasons, the Appellants in this matter respectfully request that this Court find that the District Court made reversible errors and that the matter should be reversed and remanded for a new trial. Fairness dictates such a result.

DATED this 9th day of November, 2009

MERRILL & MERRILL, CHARTERED

By: _____
Thomas J. Lyons
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Thomas J. Lyons, the undersigned, do hereby certify that two(2) true, full and correct copies of the foregoing document was this 9th day of November, 2009, served upon the following in the manner indicated below:

Lowell N. Hawkes
Lowell N. Hawkes, Chartered
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[X] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Facsimile

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Thomas J. Lyons